

Terms and Conditions of Subcontract

SUBCONTRACT BETWEEN:

The ICG entity named in the Schedule ("ICG ") AND:

The Subcontractor named in Item 1 of the Schedule ("the Subcontractor")

1 TERMS

1.1 These terms and conditions (Terms) constitute the agreement between ICG and the Subcontractor.

1.2 These Terms shall be regarded as being accepted by the Subcontractor upon commencement of the Works set out in Item **Error! Reference source not found.** of the Schedule, at which time an agreement is established on these Terms (regardless of whether either party has executed this Subcontract).

1.3 If the Subcontract Sum is indicated in Item 3 of the Schedule as a fixed lump sum price for the Works except as is expressly contemplated by the Subcontract, it is not subject to adjustment or recalculation. The Subcontractor warrants that the Subcontract Sum includes:

- (a) the supply by the Subcontractor of all personnel, goods, labour, materials, equipment, transport, supervision, administration and co-ordination necessary for and incidental to the provision of the Works in accordance with the Subcontract;
- (b) all increases that may occur during the execution of the Works in the cost of all labour, goods, material, equipment, necessary for and incidental to the Works;
- (c) the supervision, coordination, management, administration, control, integration and incorporation of all works into the Works;
- (d) the cost of compliance with legislative requirements, codes of practice, standards and other requirements, including all costs arising from a change to those requirements;
- (e) the cost of obtaining and maintaining insurance policies in accordance with the Subcontract;
- (f) an allowance for the risk expressly or impliedly accepted by Subcontractor under the Subcontract; and
- (g) an allowance for the performance of each of the obligations imposed on the Subcontractor under the Subcontract.

1.4 The Subcontractor must perform the Works:

- (a) in accordance with the Subcontract and all applicable legislative requirements;
- (b) so as to achieve Substantial Completion by each of the Date for Substantial Completion;
- (c) by independently planning and executing the Works in a manner that is safe, efficient and effective;
- (d) in a sound and workmanlike manner and so as to be free from defects and fit for their intended purpose;
- (e) with due care, skill and diligence;
- (f) applying nationally accepted building design, engineering and construction standards, codes and procedures including applicable Australian Standards;
- (g) with due expedition and without unnecessary or unreasonable delays and in accordance with any approved program; and
- (h) using materials of merchantable quality which are fit for their intended purpose.

1.5 The Subcontractor is responsible for determining the appropriate construction processes, methods, sequencing and programming of the Works.

1.6 The parties agree that the Subcontractor will be responsible for obtaining the approvals (if any) set out in Item 10 of the Schedule.

1.7 Minor items not expressly mentioned in the Subcontract, but which are necessary for the satisfactory completion and performance of the Works shall be supplied and executed by the Subcontractor at its expense.

1.8 If the Subcontractor has undertaken any work arising out of or related to the Works prior to the date of this Subcontract, the terms of this Subcontract shall operate retrospectively from the earliest date on which such work was carried out.

1.9 The Subcontractor acknowledges that the Works may be the subject of a contract for other works between ICG and a third party. The Subcontractor may request from ICG a copy of such contract for inspection.

1.10 The Subcontractor must not do anything that causes ICG to be in breach of any contract ICG may be a party to concerning the purpose for which the Works are required. The Subcontractor indemnifies ICG against any cost, losses, liabilities or expenses which ICG may incur, arising out of or as a result of any act or omission of the Subcontractor that causes or contributes to a breach by ICG of such a contract.

2 SECURITY

2.1 The Subcontractor must provide security in accordance with Item 6 of the Schedule (Security).

2.2 ICG may have recourse to Security where:

- (a) ICG has become entitled to exercise a right or power under the Subcontract in respect of the Security;
- (b) the Subcontractor is in default or breach of the Subcontract;
- (c) the Subcontractor has repudiated or given notice of an intention to repudiate the Subcontract;
- (d) the Subcontractor has failed to pay ICG an amount certified as owing by the Subcontractor to ICG in accordance with clause 15.9; or
- (e) the Subcontractor is otherwise indebted to ICG and ICG remains unpaid after 5 business days has elapsed since ICG issued an invoice to the Subcontractor seeking payment of the debt.

2.3 ICG must release the Security in accordance with Item 6 of the Schedule.

3 SUBCONTRACTING

3.1 The Subcontractor must not subcontract the whole or any part of the Works without the prior written approval of ICG.

3.2 Neither approval to subcontract nor subcontracting will relieve the Subcontractor from any liability or obligation under the Subcontract.

3.3 The Subcontractor shall be liable to ICG for the acts, defaults and omissions of subcontractors and the employees and agents of the subcontractors.

3.4 The Subcontractor must provide ICG with any required warranties from subcontractors and suppliers expressed in favour of ICG.

3.5 The Subcontractor must ensure that all agreements it enters into with any supplier of goods or services to the Subcontractor in respect of its obligations under this Subcontract includes a clause to the same effect as clauses 7.4 and 7.5.

3.6 The provisions of this clause 3 will survive the expiration or termination of this Subcontract.

4 PROTECTION OF PEOPLE AND PROPERTY

4.1 Insofar as compliance with the Subcontract permits, the Subcontractor must:

- (a) provide all things and take measures necessary to protect people and property and, without limitation, take full responsibility for the adequacy, stability and safety of all temporary works, construction plant, operations on Site and methods of construction and transportation;
- (b) establish, maintain and comply with emergency safety and security procedures applicable to the Works as notified to the Subcontractor by ICG from time to time or which the Subcontractor should reasonably be aware of; and
- (c) avoid interference with the passage of people and vehicles; and prevent nuisance and unreasonable noise and disturbance.

4.2 Without limiting clause 4.3 if the Subcontractor or its employees or agents damage property, including public utilities and services and property on or adjacent to the Site, the Subcontractor must promptly rectify the damage at its cost and pay any compensation the law requires the Subcontractor to pay.

4.3 If the Subcontractor fails to comply with an obligation under this clause 4, ICG may, after reasonable written notice to the Subcontractor (and in addition to ICG's other rights and remedies) have the obligation performed by others. The cost incurred will be a debt due from the Subcontractor to ICG.

5 PROTECTION OF THE WORKS

5.1 If urgent action is necessary to protect the Works, and the Subcontractor fails to take the action, in addition to any other remedies available to it, ICG may take the necessary action. If the action was action which the Subcontractor should have taken at the Subcontractor's cost, the cost incurred will be a debt due from the Subcontractor to ICG. ICG may give the Subcontractor prior written notice of its intention to take the action referred to in this clause 5.1.

5.2 The Subcontractor shall be responsible for care of:

- (a) the whole of the Works from and including the Date for Access to Site to 4:00 pm on the Date of Substantial Completion (except to the extent provided in paragraph (b)); and
- (b) outstanding work and items to be removed from the Site by the Subcontractor after 4:00 pm on the Date of Substantial Completion until completion of outstanding work or compliance with clause 12.

5.3 Additionally, the Subcontractor shall be responsible for the care and preservation of:

- (a) unfixed items accounted for in a Progress Certificate;
- (b) things entrusted to the Subcontractor by ICG; and
- (c) things brought onto the Site by subcontractors for carrying out the Works.

5.4 If loss or damage occurs to the Works during the period of the Subcontractor's care, the Subcontractor shall, at its cost, rectify such loss or damage.

6 INSURANCE

- 6.1 Before commencing the Works, the Subcontractor must effect all insurance required to be effected by law including worker's compensation insurance. In addition the Subcontractor will effect the insurances indicated in Item 11 of the Schedule for the amount(s) indicated in Item 11 of the Schedule, for the period commencing from the earlier of commencement of the Works by the Subcontractor or the Date of Access to Site, until Substantial Completion of the whole of the Works.
- 6.2 The interest of ICG shall be noted on the Public Liability and Contract Works policies procured by the Subcontractor pursuant to this clause and each policy must be with an insurer with a Standard and Poor's Long-Term Insurer Financial Strength Rating of A or above. The policies must provide a limit of indemnity for each and every occurrence for an amount not less than the sums set out in Item 11 of the Schedule.
- 6.3 Before the Subcontractor commences work on the Site, and when requested in writing by ICG the Subcontractor must provide satisfactory evidence of such insurance effected and maintained (including a full copy of each policy including the schedules and endorsements and a certificate of currency) to the satisfaction of ICG. Insurance will not limit liabilities or obligations under other provisions of the Subcontract.
- 6.4 The Subcontractor must pay any excess or deductible payable under the policies of insurance referred to in this clause 6.
- 6.5 If the Subcontractor fails to provide evidence of compliance with this clause, ICG may effect the insurances in this clause and the cost will be a debt due from the Subcontractor to ICG. Additionally, if at the date of a Payment Schedule the Subcontractor has failed to provide evidence of satisfactory compliance with this clause, ICG may certify a scheduled amount of 'nil' and rely on a failure to provide evidence in accordance with this clause as a reason for withholding payment.

7 INDEMNITY BY SUBCONTRACTOR

- 7.1 The Subcontractor will indemnify ICG against:
- (a) loss of or damage to ICG's property (other than the Works);
 - (b) claims by any person against ICG in respect of personal injury, illness or death of any person or loss of, or damage to, any other property;
 - (c) all loss and damage arising from a breach of the Subcontract by the Subcontractor; and
 - (d) claims by any person against ICG in respect of nuisance, unreasonable noise and disturbance or other like claim, arising out of or as a consequence of the carrying out of the Works. The indemnity shall be reduced proportionally to the extent that the act or omission of ICG may have contributed to the injury, death, loss or damage.
- 7.2 Each indemnity in this Subcontract survives the issue of the Final Certificate or termination of this Subcontract.
- 7.3 ICG may recover payment under an indemnity in this Subcontract before it makes the payment in respect of which the indemnity is given.
- 7.4 To the extent permitted by law the operation of Part 4 of the *Civil Liability Act 2002* (NSW) are excluded in relation to all and any rights obligations and liabilities of the Subcontractor under this Subcontract whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or otherwise.
- 7.5 To the extent permitted by law, the parties agree that the proportionate liability schemes set out in clause 7.4 will not have any application to this Subcontract, the performance of the Works, or any of the obligations of the Subcontractor under this Subcontract or at law and the parties' rights, obligations and liabilities will be those which would exist if the proportionate liability schemes in clause 7.4 did not apply.

8 WORK HEALTH AND SAFETY

- 8.1 Without limiting or in any way affecting the duty of the Subcontractor to carry out the Works, the Subcontractor must:
- (a) strictly comply with all legislative requirements relating to the safety of persons on or about the Site, and the carrying out of the Works, including without limitation any WHS Legislation;
 - (b) comply with any reasonable safety requirements of ICG and maintain a written record of such compliance;
 - (c) take full responsibility for the adequacy, stability and safety of all materials and equipment and methods of performing the Works;
 - (d) to the extent permitted by law discharge ICG's obligations under any WHS Legislation (insofar as those obligations arise in connection with the Works) unless ICG directs otherwise;
 - (e) do all things necessary to assist ICG and refrain from doing anything that may impede ICG in discharging its obligations under any WHS Legislation;
 - (f) immediately comply with directions on safety issued by any relevant authority or ICG;
 - (g) notify ICG of any accident, workplace health and safety incident, injury damage to property or the environment which occurs during

the performance of the Works and assist ICG in any subsequent investigation by ICG; and

- (h) on and from the date of this Subcontract, to the extent permitted by law, indemnify ICG and keep ICG indemnified against all costs, expenses, fines, losses or damages, which ICG may become liable for, suffer or incur in respect of or arising directly or indirectly out of the failure by ICG to comply with its obligations pursuant to this clause 8. The Subcontractor acknowledges that the cost of compliance with its obligations under this clause 8 is included in the Subcontract Sum.

- 8.2 The Subcontractor acknowledges and agrees that the Site may be the subject of a contract for other works between ICG and a third party (the Main Contractor) and that the Main Contractor may be the nominated Principal Contractor for the purposes of WHS Legislation. The Subcontractor must not impede the Main Contractor and otherwise must comply with the Main Contractor's reasonable site safety and security requirements.

9 SITE & ACCESS

- 9.1 Provided the Subcontractor has complied with clauses 2.1 and 6.1, ICG shall on or before the date of the Subcontract give the Subcontractor non-exclusive access to sufficient of the Site for commencement of the Works on Site. If ICG has not given the Subcontractor non-exclusive access to such of the Site to enable the Subcontractor to carry out all of the Works, ICG shall give the Subcontractor non-exclusive access to such further portions of the Site as may, from time to time, be necessary for carrying out the Works. Delay by ICG in giving non-exclusive access to the Site shall not be a breach of the Subcontract.
- 9.2 The Subcontractor must not deposit or store materials, goods, equipment, soil or any other substance on the Site without the prior approval of ICG.
- 9.3 The Subcontractor must at all times comply with any conditions of access to the Site imposed by ICG and must confine all activities in relation to the Works within the boundaries of the Site.
- 9.4 Unless otherwise stated in the Subcontract Documents, the Subcontractor must not without the prior written approval of ICG erect, display, affix or exhibit or so allow on the Site or the Works any sign, advertisement, name, notice or advertising structure.
- 9.5 ICG and its employees, consultants and agents may at any time, have access to any part of the Site for any purpose. The Subcontractor shall permit persons engaged by ICG to carry out work on the Site other than Works and shall cooperate with them.
- 9.6 The Subcontractor shall keep the Site and the Works clean and tidy and regularly remove rubbish and surplus material. If the Subcontractor fails to comply with this clause 9.6, ICG may direct the Subcontractor to rectify the non-compliance and the time for rectification. If the Subcontractor fails to comply with such a direction and that failure has not been made good within 10 business days after the Subcontractor receives written notice that ICG intends to have the subject work carried out by others, ICG may have that work so carried out and the cost incurred will become a debt due from the Subcontractor to ICG. The rights given by this clause are in addition to any other rights and remedies.
- 9.7 Compliance with the obligations set out in this clause 9 does not of itself entitle the Contractor to an EOT.

10 LATENT CONDITIONS

- 10.1 Latent Conditions are:
- (a) physical conditions on the Site and its near surrounds which differ materially from the physical conditions which should reasonably have been anticipated by a competent Subcontractor at the time of the subcontractor's tender if the Subcontractor had inspected:
 - (i) all written information made available by ICG to the Subcontractor for the purpose of tendering;
 - (ii) all information influencing the risk allocation in the subcontractor's tender and reasonably obtainable by the making of reasonable enquiries (including information available from or through Dial Before You Dig (where relevant)); and
 - (iii) the Site (including existing structure) and its near surrounds;
 - (b) any other conditions which the Subcontract specifies as Latent Conditions;
- but exclude:
- (c) weather conditions.
- 10.2 The Subcontractor, upon becoming aware of a Latent Condition while carrying out the Works, shall as soon as is practicable, and where possible before the Latent Condition is disturbed, give ICG written notice of the general nature of it.
- 10.3 If required by ICG promptly after receiving that notice, the Subcontractor shall, as soon as practicable, give ICG a written statement of:
- (a) the Latent Condition encountered and the respects in which it differs materially;

- (b) the additional work, resources, time and cost which the Subcontractor estimates to be necessary to deal with the Latent Condition; and
- 10.4 other details reasonably required by ICG.
- 10.5 Delay caused by a Latent Condition may justify an extension of time under clause 13, provided the Subcontractor has complied with the requirements of clause 13.
- 10.6 If a Latent Condition causes the Subcontractor to carry out more work, use more construction plant or incur more cost (including but not limited to extra costs for delay or disruption), than the Subcontractor could reasonably have anticipated at the time of entering into the Subcontract, the Subcontractor must seek a direction pursuant to clause 14 in respect of such additional work prior to commencing the work and may make a Variation claim pursuant to clause 14. However the Subcontractor must use all reasonable endeavours to minimise the amount of such a Variation claim.
- 11 **MATERIALS LABOUR AND GOODS**
- 11.1 The Subcontractor warrants that, unless otherwise directed, it will use suitable new materials (or where relevant certified and accepted re-used materials) and proper and tradesman like workmanship.
- 11.2 Except where the Subcontract otherwise provides, the Subcontractor shall supply everything necessary for the proper performance of the Subcontractor's obligations and discharge of the Subcontractor's liabilities.
- 11.3 ICG may direct the Subcontractor to supply particulars of the mode and place of manufacture, the source of supply, the performance capabilities and other information in respect of any materials, machinery or equipment to be supplied by the Subcontractor under or used in connection with the Subcontract.
- 11.4 The Subcontractor must:
- (a) assign to ICG (at no cost to ICG) all manufacturers' and suppliers' written warranties and guarantees which are issued or given in respect of the Works and any materials or goods incorporated in the Works as required by the Subcontract Documents, reasonably required by ICG or otherwise provided by the manufacturers and suppliers (the **Warranties**);
- (b) to the extent permitted by the law, assign to ICG (at no cost to ICG) the Warranties; and
- (c) ensure that the Warranties are on terms satisfactory to ICG and assigned as from their effective dates and in any case, before the Date of Substantial Completion.
- 12 **DEFECTS**
- 12.1 If ICG becomes aware of work done (including material or goods provided) by the Subcontractor which does not comply with the Subcontract, ICG shall as soon as practicable give the Subcontractor written notice specifying the defect and the period for rectification. If the subject work has not been rectified within the period specified, ICG may direct the Subcontractor to, do any one or more of the following:
- (a) remove the material from the Site;
- (b) demolish the work;
- (c) reconstruct, replace or correct the work;
- (d) where a time saving may be obtained, vary the work. A Variation pursuant to this clause 12.1(d) must not cost more than rectification absent any Variation. The Subcontractor is not entitled to any additional payment for any Variation directed pursuant to this clause; and/ or
- (e) not deliver that material, goods or work to the Site.
- The Subcontractor must comply with a direction under this clause 12.1 at its own expense.
- 12.2 If the Subcontractor fails to comply with such a direction and that failure has not been made good within 5 business days after the Subcontractor receives written notice from ICG that ICG intends to have the subject work rectified by others, ICG may have that work so rectified and ICG may certify the cost incurred as money due and owing from the Subcontractor to ICG.
- 12.3 Except to the extent that to do so would be inconsistent with a notice under clause 12.1 and notwithstanding that ICG has not given a direction under clause 12.1, the Subcontractor shall promptly remove, demolish, reconstruct, replace or correct material or work that is not in accordance with the Subcontract.
- 12.4 A progress payment, or a test or a failure by ICG or anyone else to disapprove any material, goods or work will not constitute approval of any work or other matter, or prejudice any claim by ICG or the power of ICG to subsequently give a direction under clause 12.1.
- 12.5 Nothing in clause 12 shall prejudice any other right which ICG may have against the Subcontractor arising out of the failure of the Subcontractor to provide material or work in accordance with the Subcontract.
- 12.6 The Defects Liability Period stated in Item 13 of the Schedule will commence on the Date of Substantial Completion at 4:00 pm. As soon as possible after the Date of Substantial Completion, the Subcontractor shall rectify all Defects existing at the Date of Substantial Completion. The Subcontractor shall carry out rectification at the times and in the manner reasonably directed by ICG, causing as little inconvenience to the occupants or users of the Works as is reasonably possible.
- 12.7 During the Defects Liability Period, ICG may give the Subcontractor a direction to rectify a Defect which:
- (a) identifies the Defect and the date for completion of its rectification;
- (b) if a time saving may be obtained, may require rectification of the defect by way of a Variation. A Variation pursuant to this clause 12.7(b) must not cost more than rectification absent any Variation; and
- (c) state a date for commencement of the rectification and whether there will be a separate Defects Liability Period as a result (not exceeding that in the Schedule, commencing at 4:00 pm on the date the rectification is completed and governed by this clause).
- 12.8 If the rectification is not commenced or completed by the stated dates, ICG may have the rectification carried out by others but without prejudice to any other rights and remedies ICG may have. The cost incurred shall be certified by ICG as money due and payable by the Subcontractor to ICG. Once a Defect has been rectified, the Subcontractor must notify ICG that the rectified defect is ready for inspection.
- 13 **TIME AND COMPLETION**
- 13.1 The Subcontractor must ensure that the Works reach Substantial Completion by the Date for Substantial Completion.
- 13.2 A party becoming aware of anything which will or will likely cause delay to the Works shall within 5 business days after the cause of the delay first arose give the other party written notice of:
- (a) the cause of the delay;
- (b) the effect or likely effect of the delay;
- (c) the effect or likely effect of the delay on the Date for Substantial Completion; and
- (d) the date on which the cause of the delay first arose.
- 13.3 The Subcontractor will be entitled to such extension of time for carrying out the Works (including reaching Substantial Completion) as ICG assesses ('EOT'), only if:
- (a) the Subcontractor is or will be delayed in reaching Substantial Completion by a Qualifying Cause of Delay;
- (b) the Subcontract does not prohibit the Subcontractor from claiming an EOT;
- (c) the Subcontractor gives ICG:
- (i) a notice in accordance with clause 13.2; and
- (ii) as soon as practicable and in any event within 10 business days of the day upon which the delay ends, a written claim for an EOT stating the number of days sought and including a description of the basis of the claim and any evidence in support;
- (d) the delay is beyond the control of, and is not due to any default by, the Subcontractor;
- (e) the Subcontractor has:
- (i) not caused or contributed to the delay (and nor has any of its employees, agents or subcontractors);
- (ii) taken proper and reasonable steps to avoid or mitigate the delay;
- (iii) complied with any instructions of ICG with respect to the delay; and
- (iv) satisfied ICG that the delay shall or has actually delayed the Subcontractor reaching Substantial Completion on the Date for Substantial Completion.
- 13.4 The Subcontractor acknowledges that it shall not be entitled to claim an EOT unless it has strictly complied with the requirements of clauses 13.2 and 13.3.
- 13.5 Within 20 business days after receiving the Subcontractor's claim for an EOT, ICG shall give to the Subcontractor a written direction evidencing the EOT so assessed. If the EOT assessed by ICG is less than that claimed by the Subcontractor, ICG is to provide with the assessment written reasons for the difference.
- 13.6 Nothing done or not done by ICG under this clause 13 or any other clause of the Subcontract shall cause the Date for Substantial Completion to be set at large.
- 13.7 The Subcontractor is not entitled to any additional payment because of the granting of an EOT.
- 13.8 When the Subcontractor is of the opinion that Substantial Completion has been reached, the Subcontractor shall in writing request ICG to issue a Certificate of Substantial Completion. Within 10 business days after receiving the request, ICG must give the Subcontractor either a Certificate of Substantial Completion evidencing the Date of Substantial Completion or written reasons for not doing so.

- 13.9 If ICG is of the opinion that Substantial Completion has been reached, ICG may issue a Certificate of Substantial Completion even though no request has been made. The issue of a Certificate of Substantial Completion does not constitute approval of any work or other matter, nor will it prejudice any claim by ICG.
- 13.10 If the Works do not reach Substantial Completion by the Date for Substantial Completion, liquidated damages (as specified in Item 15 of the Schedule) for every day after the Date for Substantial Completion to and including the earliest of the Date of Substantial Completion or termination of the Subcontract or ICG taking the Works out of the hands of the Subcontractor, become due and payable to ICG.
- 13.11 The payment of liquidated damages does not relieve the Subcontractor from its obligations to complete the Works or from any of its obligations and liabilities under the Subcontract.
- 13.12 The Subcontractor accepts the risk of, and will have no entitlement to payment of, increased or additional costs and expenses or damages resulting from or attributable to delay or disruptions to the Works howsoever caused (except where the cause is a breach by ICG of an express term of the Subcontract) and whether or not it has any entitlement to an EOT.
- 13.13 The Subcontractor acknowledges that occupation of a part of the Works for the purpose of other contractors undertaking works does not constitute Substantial Completion of that part of the Works.
- 14 VARIATIONS**
- 14.1 The Subcontractor must not vary Works except as directed or approved in writing by ICG. Directions given orally must, as soon as is reasonable practicable, be confirmed by ICG in writing.
- 14.2 ICG, before the Date for Substantial Completion, may direct the Subcontractor to vary Works ('a **Variation**'). A direction under this clause must expressly state that it is a direction pursuant to this clause. Except where a direction is given in conformance with this clause, the Subcontractor will have no entitlement as a consequence of any variation to the Works.
- 14.3 Where the Subcontractor wishes to make a claim for an EOT as a consequence of a Variation, in addition to any notice or other information or thing it is required to give under this clause 14, the Subcontractor must comply with clause 13.
- 14.4 This clause does not apply to Variations directed under clause 12.1(d) or 12.7(b). ICG may give the Subcontractor written notice of a proposed Variation. The Subcontractor shall as soon as practicable after receiving such notice and in any event no less than 10 business days from the date the direction is given, notify ICG whether the proposed Variation can be effected, together with, if it can be effected, the Subcontractor's estimate of the:
- effect on the approved program (including the Date for Substantial Completion); and
 - cost of the proposed Variation.
- 14.5 ICG may direct the Subcontractor to give a detailed quotation for the proposed Variation supported by measurements or other evidence of cost. Such quotation must remain open for acceptance by ICG without increase for a period of 90 days from the date it is provided by the Subcontractor.
- 14.6 This clause does not apply to Variations directed under clause 12.1(d) or 12.7(b). ICG shall, as soon as possible, price each Variation using the following order of precedence:
- prior agreement;
 - applicable rates or prices in the Subcontract;
 - rates or prices in an agreed priced schedule of rates or schedule of prices, whether or not Subcontract Documents, to the extent that it is reasonable to use them; and
 - reasonable rates or prices, which shall include an amount for profit and all on-site and off-site overheads.
- Any deductions shall include a reasonable amount for profit but not overheads.
- 14.7 The Subcontractor is not entitled to any additional payment for any Variation:
- directed pursuant to clause 12.1(d) or 12.7(b) or as otherwise directed under the Subcontract by way of either rectification of any defect or as a result of any other default by the Subcontractor;
 - where a claim for a Variation has not been submitted within the time set out in clause 14.4; or
 - where no written direction pursuant to clause 14.2 has been provided by ICG.
- 14.8 The Subcontractor acknowledges and agrees that:
- the Subcontractor's obligations under this Subcontract are not affected by any Variation under this clause 14;
 - the Subcontractor will only be entitled to additional payment as provided for in this clause 14 or as separately agreed between the parties; and
- (c) changes to such things as the program or cost of the Works do not otherwise provide an entitlement on the part of the Subcontractor to additional payment.
- 15 PAYMENT**
- 15.1 The Subcontractor may submit to ICG a claim for payment ('**Payment Claim**') at all times for Payment Claims stated in Item 12 of the Schedule.
- 15.2 The Payment Claim must, amongst other things, include:
- the amount being claimed in the Payment Claim (the '**Claimed Amount**');
 - details of the Works or part of the Works executed by the Subcontractor, or related goods or services supplied, during the period to which the Payment Claim relates and the basis upon which the Subcontractor has calculated or assessed the value of the part of the Works the subject of the Claimed Amount;
 - a relevant and duly completed Subcontractor's Written Statement;
 - a relevant and duly completed Supporting Statement;
 - any other document required to be provided with or in relation to a Payment Claim by any term of this Subcontract or otherwise at law and any other information requested by ICG.
- 15.3 An early Payment Claim shall be deemed to have been made on the date for making that claim in accordance with the Schedule.
- 15.4 ICG shall, within 10 business days after receiving such a Payment Claim, issue to the Subcontractor:
- a progress certificate stating ICG's assessment of money due from ICG to the Subcontractor pursuant to the Payment Claim ('**Progress Certificate**'); and
 - if necessary, a certificate evidencing ICG's assessment of money due from the Subcontractor to ICG pursuant to the Subcontract.
- The net amount of the amount certified for payment in the Progress Certificate and the certificate issued in accordance is clause 15.4(b) above (if any) is the '**Scheduled Amount**'. Where the Scheduled Amount is less than the Claimed Amount (or is an amount payable by the Subcontractor to ICG), ICG must also provide a schedule setting out the Scheduled Amount and the reasons for the difference ('**Payment Schedule**').
- 15.5 Neither a Progress Certificate, Payment Schedule nor a payment of money will be evidence that the subject Works have been carried out satisfactorily. Payment other than final payment shall be payment on account only.
- 15.6 At any time and from time to time, ICG may by a further Progress Certificate correct any error that has been discovered in any previous Progress Certificate.
- 15.7 ICG will not be liable to pay for unfixed plant and materials unless specifically provided for by the Subcontract in connection with goods or otherwise agreed in writing between the parties prior to any claim for payment in respect of such unfixed plant and materials, and the Subcontractor:
- provides additional security to the satisfaction of ICG; and
 - satisfies ICG that the subject plant and materials have been paid for, properly stored, insured and protected, and labelled the property of ICG.
- Upon payment to the Subcontractor and the release of any additional security referred to in paragraph (a), the subject plant and materials shall be the unencumbered property of ICG and free of any Security Interest.
- 15.8 If the Scheduled Amount indicates an amount owing by ICG to the Subcontractor, ICG shall pay to the Subcontractor the Scheduled Amount within 20 Business Days of the end of the month the relevant Payment Claim is received in.
- 15.9 If the Scheduled Amount indicates an amount owing by the Subcontractor to ICG, the Subcontractor shall pay to ICG the Scheduled Amount within 10 Business Days of the date of the relevant Progress Certificate and Payment Schedule.
- 15.10 The payment claim following the expiry of the last Defects Liability Period, must be endorsed 'Final Payment Claim' and include all other claims by the Subcontractor whatsoever in connection with the subject matter of the Subcontract.
- 15.11 Within 10 Business Days of receipt of the Final Payment Claim or where no Final Payment Claim is served by the Subcontractor within 20 business days of the expiry of the last Defects Liability Period, ICG shall issue to the Subcontractor a 'Final Certificate' and final Payment Schedule evidencing the money finally due and payable between the Subcontractor and ICG on any account whatsoever in connection with the subject matter of the Subcontract.
- 15.12 That money certified as due and payable shall be paid by ICG or the Subcontractor, as the case may be, within 10 business days after the debtor receives the Final Certificate and final Payment Schedule.

- 15.13 The Final Certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the Subcontract except for:
- fraud or dishonesty relating to the Works or any part thereof or to any matter dealt with in the Final Certificate;
 - any defect or omission in the Works or any part thereof which was not apparent at the end of the last Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate;
 - any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation; and
 - unresolved issues the subject of any notice of dispute pursuant to the Subcontract, served before the 5th business day after the issue of the Final Certificate.
- 15.14 ICG may elect that money due and owing otherwise than in connection with the subject matter of the Subcontract also be due to ICG pursuant to the Subcontract.
- 15.15 The Subcontractor will provide ICG with the appropriate tax invoice in accordance with the GST Law in relation to any payment made by ICG to the Subcontractor under this clause.
- 15.16 Except as otherwise provided by this Subcontract, all consideration payable under the Subcontract in relation to any supply is exclusive of GST.
- 15.17 To the extent that any supply under the Subcontract constitutes a taxable supply, the consideration payable by the recipient to the supplier will be increased by the applicable amount of GST ('**GST Amount**'), which shall be calculated by multiplying the amount upon which GST is payable by the prevailing rate of GST.
- 15.18 Subject to clause 15.17, any GST Amount shall be paid by the recipient to the supplier at the same time and in the same manner as the relevant consideration is paid or given under the Subcontract, without any right of set-off or deduction (unless otherwise provided in the Subcontract).
- 15.19 If the Subcontract requires the recipient to pay, reimburse or contribute to any expense, loss or outgoing suffered or incurred by the supplier ('**Relevant Expense**'), the amount which the recipient shall pay, reimburse or contribute will be the amount net of any input tax credits to which the supplier is entitled in respect of the Relevant Expense, together with any GST Amount if the payment, reimbursement or contribution constitutes a taxable supply by the supplier to the recipient.
- 15.20 To the extent that any adjustment occurs in relation to a taxable supply, the supplier shall issue an adjustment note to the recipient within 5 business days of becoming aware of the adjustment, and any payment necessary to give effect to such adjustment shall be made within 5 business days after the date of receipt of the adjustment note.
- 16 SUBCONTRACT DOCUMENTS**
- 16.1 Figured dimensions shall prevail over scaled dimensions in a discrepancy. If the Subcontractor discovers any errors, omissions, inconsistencies, ambiguities, conflicts or discrepancies in any document prepared for the purpose of carrying out the Works (**Document Discrepancy**), the Subcontractor must give ICG written notice of it. ICG will direct the Subcontractor as to the interpretation and construction to be followed.
- 16.2 Unless otherwise stated in the Subcontract, the order of precedence (in descending order) stated in Item 9 of the Schedule applies to resolve any Document Discrepancy in the Subcontract Documents to the extent necessary to resolve the Document Discrepancy.
- 16.3 If the Subcontractor considers that a direction as to the interpretation and construction to be followed or a request for information involves a variation, the Subcontractor must, before proceeding with the work the subject of the direction as to the interpretation and construction to be followed (but in any event, not later than 5 business days after the response) notify ICG of this and seek a direction from ICG under clause 14.1.
- 16.4 If the Subcontractor does not give the notice within the time specified, the Subcontractor may not make any claim for additional payment or EOT in respect of the response to the request for information and any claims will be absolutely barred.
- 16.5 The Subcontractor acknowledges that it has reviewed the Subcontract Documents and is satisfied with the adequacy of the Subcontract Documents to perform its obligations under the Subcontract, including carrying out the Works.
- 16.6 The Subcontractor is not entitled to an adjustment of the Subcontract Sum or an EOT for any Document Discrepancy in any Subcontract Document or other document prepared by or on behalf of the Subcontractor for the purpose of executing the Works (whether prepared before or after the date of this Subcontract).
- 16.7 Information or documents of any nature made available to the Subcontractor by or on behalf of ICG do not constitute a warranty or representation of any kind by ICG.
- 17 CONFIDENTIALITY**
- 17.1 The Subcontractor must keep ICG's Confidential Information confidential and not deal with it in any way that might prejudice its confidentiality. ICG and the Subcontractor acknowledge that information resulting from the activities of the Subcontractor pursuant to this Subcontract will also be regarded as Confidential Information and the Subcontractor agrees that its obligations in clause 17.1 extend to this category of information.
- 17.2 The Subcontractor agrees to indemnify ICG fully against all liabilities, costs and expenses which ICG may incur as a result of any breach of this clause by the Subcontractor.
- 17.3 The Subcontractor acknowledges that damages may be an inadequate remedy for breach of this clause 17 and that ICG may obtain injunctive relief against the Subcontractor for any breach of this clause 17.
- 17.4 The obligations accepted by the Subcontractor under this clause 17 survive termination or expiry of this Subcontract.
- 18 DISCLOSURE AND OWNERSHIP OF INTELLECTUAL PROPERTY**
- 18.1 The Subcontractor must communicate to ICG promptly and fully all discoveries, improvements and inventions made or conceived by the Subcontractor in the course of performing the Works which are along the lines of the actual or anticipated business, work or investigations of ICG or which result from or are suggested by any work performed for ICG, and such inventions, whether or not they contain intellectual property rights capable of protection, shall be and remain the sole and exclusive property of ICG or its nominees.
- 18.2 The Subcontractor acknowledges ICG's Intellectual Property interests in the Subcontract Documents and that ICG (or its associated entities or persons) own all Intellectual Property created by the Subcontractor in connection with the Works, that now exists or that later comes into existence.
- 18.3 The Subcontractor agrees to indemnify ICG fully against all liabilities, costs and expenses which ICG may incur as a result of any breach of this clause by the Subcontractor or its employees.
- 18.4 The obligations accepted by the Subcontractor under this clause 18 survive termination or expiry of this Subcontract.
- 19 TERMINATION OF CONTRACT**
- 19.1 If a party breaches (including repudiates) the Subcontract, nothing in this clause shall prejudice the right of the other party to recover damages or exercise any other right or remedy.
- 19.2 ICG may terminate this Subcontract by notice in writing to the Subcontractor if the Subcontractor fails to observe any term of this Subcontract and fails to rectify this breach to the satisfaction of ICG following the expiration of 5 business days' notice of the breach being given in writing by ICG to the Subcontractor.
- 19.3 Notwithstanding anything in this Subcontract to the contrary, ICG may terminate this Subcontract at any time by notice in writing to the Subcontractor, if the Subcontractor is guilty of any dishonesty, serious misconduct or serious neglect of duty in connection with the performance of the Works.
- 19.4 ICG or the Subcontractor may terminate this Subcontract upon the occurrence of an Insolvency Event in relation to the other party.
- 19.5 ICG, may (without prejudice to any of its other rights or entitlements under the Subcontract) and for its sole convenience terminate the Subcontract by the giving of written notice by ICG to the Subcontractor. If ICG terminates the Subcontract under this clause 19.5, the Subcontractor shall be entitled to payment of the following amounts as determined by ICG:
- the value of all Works carried out in accordance with the Subcontract up to the date of termination assessed by reference to the Subcontract Sum as at the date of termination (less amounts previously paid to the Subcontractor in respect of such work); and
 - except to the extent already provided by clause 19.5(a), the cost of all material, goods, plant and equipment purchased or ordered by the Subcontractor for the work under the Subcontract but only if:
 - upon payment by ICG of such money, the unencumbered title to the materials, goods, plant and equipment passes to ICG; and
 - such materials, plant and equipment has been purchased or ordered in accordance with the approved program (and not in advance);
 - except to the extent already provided by clause 19.5(a) and (b), the direct, necessary and reasonable costs incurred by the subcontractor (and evidenced to ICG in writing) as a result of complying with its obligations under clause 19.5.
- 19.6 The Subcontractor acknowledges and agrees that its sole remedy for ICG terminating the Subcontract pursuant to clause 19.5 shall be the amount due to the Subcontractor under clause 19.5. The Subcontractor shall have no right to make any claim for compensation in respect of such termination other than in respect of the amount payable under clause 19.5.

20 **DISPUTE RESOLUTION**

- 20.1 In the event that a dispute arises under or about this Subcontract, each party must try to resolve any such dispute in good faith in accordance with this clause 20. Neither party may commence legal proceedings against the other party unless and until this clause 20 has been observed.
- 20.2 Should a difference or dispute arise between the parties concerning the subject matter of the Subcontract, the following process to resolve the dispute shall be followed:
- (a) the aggrieved party shall notify the other party of the breach in writing and suggest a remedy for the breach;
 - (b) the other party shall respond to the aggrieved party's correspondence within 5 business days;
 - (c) should the dispute remain unresolved, the parties shall meet at the offices of ICG and in an attempt to informally resolve the matter; and
 - (d) should the dispute remain unresolved after the occurrence of the meeting described in clause 20.2(c), then the aggrieved party must refer the dispute to the Institute of Arbitrators and Mediators Australia for resolution in accordance with and subject to the Institute of Arbitrators and Mediators Australia Rules for Mediation and Conciliation as amended or replaced from time to time. The cost of any mediation must be shared equally between the parties. If the dispute is not resolved at mediation then the matter may be litigated.
- 20.3 The parties further agree that any information or documents prepared for the purposes of a mediation held pursuant to clause 20.2(d) must be kept confidential by the parties and may not be used except to attempt to settle the dispute.

- 20.4 Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the Subcontract or to seek injunctive or urgent declaratory relief.

21 **MISCELLANEOUS**

- 21.1 (**assignment**) This Subcontract may not be assigned without the consent of all the parties.
- 21.2 (**jurisdiction**) The parties agree that the law of the jurisdiction where the Site is located governs this Subcontract. The parties submit to the exclusive jurisdiction of the courts of that state or Territory and the Federal Court of Australia.
- 21.3 (**entire agreement**) This Subcontract including any attachments, sets out the entire agreement and understanding between the parties relating to the subject matter hereof. All prior agreements and all prior negotiations, representations and communications relating to the same subject are superseded by this Subcontract.
- 21.4 (**terms binding**) By performing any part of the Works, the Subcontractor is deemed to have agreed to the terms of this Subcontract, and to have represented to ICG (on which representation ICG relies) that these are the only contractual terms which apply to the provision of goods or performance of Works by the Subcontractor, and the Subcontractor will not endeavour to obtain ICG's agreement to any additional or alternative terms.
- 21.5 (**no waiver**) A party's right to enforce this Subcontract will not be prejudiced or restricted by any forbearance, delay or indulgence on its part in enforcing this Subcontract. If a party waives a right under this Subcontract, this does not operate as a waiver of a subsequent breach of this right or any other right under this Subcontract.

22 **DEFINITIONS**

"**Certificate of Substantial Completion**" has the meaning in clause 13.8;

"**Claimed Amount**" has the meaning in clause 15.2(a);

"**Confidential Information**" includes but is not limited to any information marked as confidential and any information received or developed by or on behalf of the Subcontractor during the term of this Subcontract, which is not publicly available and relates to processes, equipment and techniques used by ICG in the course of ICG's business;

"**Date for Access to Site**" means the date stated in Item 7 of the Schedule;

"**Date for Substantial Completion**" means the date stated in Item 8 of the Schedule as amended in accordance with the Subcontract;

"**Date of Substantial Completion**" means the date in the Certificate of Substantial Completion or such other date as is determined in any dispute resolution process;

"**Defects**" has the meaning in clause 12.1 and includes omissions;

"**Defects Liability Period**" has the meaning in clause 12.6;

"**EOT**" (from 'extension of time') has the meaning in clause 13.3;

"**Final Certificate**" has the meaning in clause 15.11;

"**Final Payment Claim**" means the final payment claim referred to in clause 15.10;

"**GST**" means a tax, levy, duty, charge or deduction, together with any related additional tax, interest, penalty or other charge, imposed by or under a GST Law;

"**GST Law**" means A New Tax System (Goods and Services Tax) Act 1999 (Cth);

"**Insolvency Event**" means:

- (a) bankruptcy or insolvency proceedings are commenced against a party, or a party is declared bankrupt or insolvent;
- (b) any step is taken to enter into any scheme of arrangement between a party and its creditors;
- (c) any step is taken by a mortgagee to enter into possession or dispose of the whole or any part of a parties' assets or business;
- (d) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a liquidator, a provisional liquidator, an administrator or other like person to a Party or to the whole or any part of its assets or business;
- (e) a party suspends payment of its debts generally;
- (f) a party is or becomes unable to pay its debts when they are due or it is or is presumed to be insolvent for the purposes of any provision of the Corporations Act 2001 (Cth); or
- (g) a similar event;

"**Intellectual Property**" includes any patent, registered design, trademark or name, copyright or other like rights, whether registered, registrable or unregistered but excludes non-assignable moral rights and similar non assignable person rights;

"**Latent Condition**" has the meaning in clause 10.1;

"**Payment Claim**" has the meaning in clause 15.1;

"**Payment Schedule**" has the meaning in clause 15.4;

"**Principal Contractor**" has the meaning given to it in Regulation 293 of the *Work Health and Safety Regulation 2017* (NSW);

"**Progress Certificate**" has the meaning in clause 15.4;

"**Qualifying Cause of Delay**" means a delay caused by:

- (a) any act, default or omission of ICG or its consultants, agents or other contractors (not being employed by the Subcontractor);
- (b) anything stated in Item 14 of the Schedule;

"**Schedule**" means the schedule included at Annexure A;

"**Scheduled Amount**" has the meaning in clause 15.4;

"**Security**" means the security provided by the Subcontractor to ICG pursuant to clause 2;

"**Security Interest**" has the meaning given to it in the *Personal Property Securities Act 2009* (Cth) as amended or replaced from time to time;

"**Site**" means the Site specified in Item 2 of the Schedule and any other lands and places made available to the Subcontractor by ICG for the purpose of the Subcontract;

"**Subcontract**" means the agreement between ICG and the Subcontractor as evidenced by this subcontract including any special conditions, the Schedule and attachments;

"**Subcontract Documents**" means the documents listed in Item 9 of the Schedule;

"**Subcontract Sum**" means the amount stated in Item 3 of the Schedule;

"**Subcontractor's Written Statement**" means is the form approved by the New South Wales Office of State Revenue for the purpose of section 175B of the *Workers Compensation Act 1987* Schedule 2, Part 5 of the *Pay-roll Tax Act 2007* and section 127 of the *Industrial Relations Act 1996*;

"**Substantial Completion**" is the stage in the carrying out and completion of the Works when:

- (a) the Works are complete except for minor defects:
 - (i) which do not prevent the Works from being used for their intended purpose, as may be stated in the Subcontract Documents;
 - (ii) which ICG determines the Subcontractor has reasonable grounds for not promptly rectifying; and
 - (iii) the rectification of which will not prejudice the Works of ICG or other contractors;
- (b) tests which are required to be carried out and passed before the Works reach Substantial Completion have been carried out and passed;
- (c) documents and other information required under the Subcontract which are essential for the use, operation and maintenance of the Works for its intended purpose have been supplied;
- (d) all debris, rubbish, materials, temporary works and construction plant has been removed from the Site and the Site has been cleaned to the standard required by ICG;

- (e) all certificates and approvals required to be given or issued under a legislative requirement before the Works can be used for their intended purpose have been issued or given and handed to the ICG; and
- (f) any other pre-requisite for Substantial Completion set out in the Subcontract Documents has been met by the Subcontractor;

“Supporting Statement” has the meaning given in the *Building and Construction Industry Security of Payment Act 1999* (NSW);

“the Works” means the whole of the work to be carried out and completed in accordance with the Subcontract, including Variations provided for by the Subcontract, which by the Subcontract is to be handed over to ICG;

“Variation” has the meaning in clause 14; and

“WHS Legislation” means the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulations 2017* (NSW) as amended or replaced from time to time.